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A

STATEMENT OF REASONS

SHOWING

THE ILLEGALITY OF THAT VERDICT

UPON WHICH

SENTENCE OF DEATH HAS BEEN PRONOUNCED AGAINST

JOHN W. WEBSTER

FOR THE ALLEGED MURDER OF GEORGE PARKMAN.

BY A MEMBER OF THE LEGAL PROFESSION.

"*Præstare sontem dimitti, quam innocentem damnari.*"—JUR. CIV.

"*Ante omnia enim, de corpore delicti constare, et inquiri debet.*"—HUBERUS.

"A single condemnation, without regard to law, whether in its forms or its principles, is more dangerous to society, than the escape of a thousand malefactors; for such a condemnation, in over-earnestness to punish the guilty, may become a precedent, which shall open the door to abuses, subversive of all legal protection to the innocent."
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A

STATEMENT OF REASONS, &c.

On the 23d day of November, 1849, Dr. George Parkman left his residence in the city of Boston, and has not since returned. He was a man of large wealth, and of a character so eccentric, as at times to indicate the necessity of a collateral mind in the management of his affairs and the protection of his person. A great portion of his property consisted of real estate in the city of Boston, and his principal business was that of collecting rent from his numerous tenants, which became due to him almost each day in the year. He had acquired habits of exceeding punctuality, and a reputation for great integrity.

On the 30th day of the same November, Dr. John W. Webster was arrested, charged with the crime of the murder of Dr. George Parkman. Dr. Webster is a Professor of Chemistry and Mineralogy, and upon those subjects has lectured for many years to the students in Harvard College, and in the Medical College at Boston. He resided in Cambridge, was a Professor in the College and a member of the Faculty, and dependent for support upon his salary and the fruits of his professional labors;—he was devoted to his profession, and had acquired an enviable distinction for his attainments in its several branches. In his habits he was quiet and domestic;—in disposition, humane, mild, and amiable, with somewhat of the student's timidity and nervous irritability.

On the first Monday in January succeeding his arrest, the Grand Jury of Massachusetts presented a Bill of Indictment against him for the murder of Dr. Parkman. On the 19th of March he was put upon his trial on that indictment—on the 30th of March he was found guilty; on the 1st of April sentence of death was passed upon him, and now—manacled and in prison—he awaits the issuing of the Executive Warrant which shall direct the execution of the sentence.

When we consider this case in all its various aspects—the character, the position of the parties—the nature of the crime charged—the circumstances under which it is alleged to have been committed—the means averred to have been used for its concealment—the secret preliminary investigation by the public authorities—the evidence relied upon—first, to prove a murder—and second, to prove the prisoner the murderer—the conduct of the prosecution—the conduct of the defence—the judicial dictation of the law—the unprecedented expressions of the conclusions of the Court upon the evidence, and the mechanical echo of those conclusions by the jury—it is a case so remarkable, that we may seek in vain to find its parallel in the judicial records of any age or nation in which law is made and enforced for the protection of human right, and in which the administration of public justice is regarded as the best standard of public honor and public virtue and domestic freedom.

An intense interest in the trial and its result, has pervaded all classes of the community throughout the country. The evidence adduced on either side, the arguments of counsel, and the charge of the Court, have all been reported with great minuteness of detail, and with an asserted and apparent accuracy, never before attained in the report of such a proceeding. Upon the wires of the telegraph this report has been carried to every press in the land: being within the reach of all, it has been read and re-read by all, so that every intelligent mind in the country is perhaps as capable of forming a just conclusion upon the evidence, as were the twelve men of Boston who passed between the country and the prisoner. The sentiment of the community has been communicated through the press. It is a sentiment of reprobation of the verdict—of reprobation of the weak, and timid and vacillating course of the defence—of reprobation of the judicial directions to the jury both as to the law and the facts—as nearly unanimous as was ever the sentiment of any community upon any subject. Beyond the immediate precincts of Boston, there seems to be an all-pervading feeling that a great wrong has been done, and that a great judicial murder is about to be committed, unless prevented by the voice of the people speaking through their organ, the Massachusetts Executive.

Now, whence proceeds this feeling? What is the origin and what the foundation of this sentiment so universal and heartfelt in condemnation of this Boston trial and Boston verdict? We purpose to attempt an answer to these questions; and we design to show that this feeling proceeds from no diseased sen-

sibility or morbid sympathy, which is but too apt to be excited in behalf of the greatest culprits, when they are at the gallows' foot—that this sentiment originates in no vulgar prejudice against condemnations upon circumstantial evidence, but that it arises out of a deep, sincere, and intelligent conviction, produced by the tone of the prosecution and that of the defence—by the evidence—by the language of the counsel and of the Judge—that from the beginning of the trial to its termination, the rule of law, which, like the rule of charity, "thinketh no evil," was reversed against the prisoner, and that the burden of proving himself innocent, beyond a reasonable doubt, was cast upon him, to rebut the presumption of guilt which had been raised against him in the community—a conviction that the verdict of the jury is the result, and, upon the testimony before them, could have been the result alone, of an utter disregard of some, and a palpable violation of others, of the well-established rules of evidence, which, in civil jurisprudence, have been justly called the "landmarks of property," and in criminal, the "safeguards of life and of liberty."

Let us briefly and fairly state—first, the facts which are admitted on both sides, or proved and not denied; secondly, the averments of the prosecution which are denied by the defence and the testimony produced to prove them; and thirdly, the averments of the defence which are denied by the prosecution and the testimony produced in their support.

First, the facts which are admitted on both sides, or proved and not denied:

Dr. Webster was the pecuniary debtor of Dr. Parkman, and as security for the payment of the debt, evidenced by promissory notes, had executed to him a mortgage upon his cabinet of minerals. Parkman urged the payment of the debt with an incessant and relentless importunity. On the morning of Friday, November 23d, Dr. Webster called at the residence of Dr. Parkman, and made an appointment to meet him for the settlement of the claim, at half-past one o'clock on that day, at his (Webster's) rooms at the Medical College. The appointed hour was immediately after the close of Dr. Webster's lecture to his class of students at the college. At about the time appointed, and directly after the lecture, which Dr. Webster did deliver, Dr. Parkman met him at the college. Since this time Parkman has not returned to his home, nor been seen by any member of his family. Dr. Webster returned to his residence on that Friday afternoon at the usual hour of tea, about

six o'clock, and after tea went with his wife to visit a neighboring professor. On the day following he dined at his house, and passed the afternoon and evening in reading aloud to his wife and daughters, and in the amusement of whist. The disappearance of Dr. Parkman was published in the Boston papers on Saturday; and connected with the fact, it was stated that some "unknown person" had made an appointment for an interview with Dr. Parkman on the day preceding. On Sunday morning Dr. Webster went to church with his family, and in the afternoon went into Boston to inform the brother of Dr. Parkman that he was the person who had met his brother by appointment the Friday preceding. He did so inform him, and stated that at the interview he had paid him the money due him, (specifying the amount)—that he received the money without counting it and went hurriedly away, promising to see to the cancellation of the mortgage. On the Monday, Tuesday, and Wednesday succeeding, Dr. Webster was at his residence at the usual hours for his family meals, and in the evenings either with his family and friends at home, or at some party abroad. During all this while, and up to the hour of his arrest, no abstraction of manner or difference in deportment was noticed or recollected by any of his friends. Thursday was Thanksgiving-day, and it was passed by Dr. Webster entirely at his own home. The Tuesday preceding, he delivered the last lecture of his course at the Medical College, and gave the porter of the college an order for a Thanksgiving turkey. On this same day, the officers employed to search for Dr. Parkman searched the various apartments in the Medical College, and among the rest, those occupied by Dr. Webster. It was previous to his lecture, and he was in his laboratory with the door locked. He admitted them when summoned by a knock upon the door, and exhibited to them his various rooms. On the Friday following Thanksgiving-day, portions of a human body were taken from a vault beneath the Medical College, communicating with Dr. Webster's laboratory. Other portions of a human body were subsequently, and on the same day, discovered packed in a tea-chest in one of the rooms of Dr. Webster, with a knife, a quantity of tan, and some minerals; and still other portions of a human body were, at about the same time, found, together with a number of mineral teeth, in the furnace of Dr. Webster's laboratory. The bones found might all have belonged to one body, as there were none duplicated. The remains discovered were not dissimilar to such as might have constituted, in part, the body of Dr. Parkman.

The officers of justice took Dr. Webster into custody at his residence in Cambridge this same Friday evening. They found him at his door just parting with a friend: they told him it was proposed to make another search in the college, and desired him to be present, and under this pretence, took him into Boston in a carriage. No reluctance or hesitation was expressed on his part to accompany them: he manifested no confusion or peculiarity of manner whatever; but talked with the utmost coolness upon the subject of Dr. Parkman's disappearance and the various reports in circulation concerning it, and in his natural manner upon indifferent subjects. The carriage was stopped at the city prison: there the party alighted, and the officer informed Dr. Webster that he was under arrest, charged with the murder of Dr. Parkman. This sudden and unexpected announcement operated as a shock upon his nervous system, and he was completely bewildered and prostrated. Before he had recovered from the shock or regained his physical faculties, he was hurried off under the guard of the officials to the Medical College, apparently for no other purpose than to enable the officers and others in attendance to testify to his manner and appearance, and exclamations, upon the exhibition to him of the remains found there. He was carried back to the prison. On the following morning he had entirely recovered from the shock of the previous evening, at once assumed, and, up to the day of his trial, retained his wonted composure and cheerfulness, and all the external *indicia* of an innocent conscience.

We have here stated, as we believe, all the prominent and material facts of this remarkable case, which are on neither side disputed or disproved. We do not pretend to have omitted none; but those we have omitted to state, such as have reference to the manner and conversation, and exclamations of Dr. Webster at various times—his call to ascertain if Dr. Parkman had cancelled the mortgage—his possession of the notes which he had given Dr. Parkman, and many other minor circumstances, are either in themselves immaterial, or they are wholly immaterial for consideration, in the view in which we propose to discuss the question.

Secondly—What are the averments of the prosecution which are denied by the defendant, and what are the proofs of those averments?

The prosecution avers—1st. That the remains of the human body found in the Medical College, are portions of the body of Dr. George Parkman; 2d. That he came to his death by vio-

lence; and, 3d. That the defendant committed that violence with malice and premeditation, having enticed him into his apartments with that felonious and murderous design. The first two propositions constitute the averment of what is called the *corpus delicti*—that is, the fact that a murder has been committed by somebody. The testimony produced to prove these averments is entirely circumstantial, and, (setting aside the testimony as to the alleged cut in the thorax and the fractured bone, in relation to which the witnesses for the prosecution are at variance, and therefore it amounts to nothing,) it proceeds from two witnesses—first, Mr. R. G. Shaw, a brother-in-law of Dr. George Parkman, who undertakes to identify the remains as those of Parkman. It appears, however, upon cross-examination, that any remains exhibited to him with similar hair upon the breast, would have been identified by him to be those of Parkman, for it was the hair alone which led him to the conclusion. But his identification is wholly destroyed when he further swears, upon cross-examination, that "he should not have suspected the remains to be those of Dr. Parkman, if he did not know that Dr. Parkman was missing." It is too lamentably apparent from the testimony of this witness and others, that important proceedings in the Probate Court had before this been dependent upon satisfactory proof of the death of the wealthy man. "*Nemo est hæres viventis.*" Hence the hurrying eagerness to identify these mutilated and scorched fragments, as components of the once living body of the ancestor; and circumstances of identity being sworn to for one purpose, it became necessary to adhere to them for another. But the identity of the *body* failing entirely, the *teeth* are resorted to; and the dentist who made false teeth for Dr. Parkman is produced. Two or three teeth are found in a block, having been subjected to the influence of the fiery furnace, and scarcely distinguishable at all as teeth; but he recognizes them as his manufacture—nay, as his manufacture for Dr. Parkman. It was exceedingly important to the supposed surviving relatives of the supposed deceased person, that these teeth should be recognized; and they were recognized—no doubt at first sight—and with a facility proportioned to the eagerness of desire expressed by those who first submitted them to his inspection, that there should be no mistake about it. If any person is entitled to the reward offered for the discovery of Dr. Parkman, surely it is this same dentist, Keep. In comparison with his, the testimony of the porter and sweep of the College sinks into absolute insignificance. Without commenting upon the strange

character of the testimony of this witness, or the dramatic effect given to it upon the trial, (any further than to say that those tears, it is charitable to believe, were the offspring of the consciousness of the gross injustice he was doing to the prisoner at the bar, from the supposed necessity of adhering to a positive identification which he had at first too hastily and inconsiderately asserted,) it is abundant for the purposes of our discussion, that one single respectable witness of the same profession, swears to the utter impossibility of identifying blocks of mineral teeth after they have been thus subjected to the action of the fire. It will be seen presently that it is not material to our design to enter upon a labored refutation of the testimony of this witness—Keep—or to show how easily it might have been demonstrated to the jury, by other and further testimony, that no reliance whatever could be placed upon it. And thus ends the proof of the *corpus delicti*. Here is all the evidence that Dr. George Parkman is dead. Here is all the evidence of his death by violence.

The third proposition contained in the averments of the prosecution is, that the defendant killed Dr. George Parkman with malice and premeditation, having enticed him into his apartments with that felonious and murderous design. In support of this proposition, the prosecution relies mainly upon all the facts which we have recited as being admitted or not disproved; and in addition to these, some other circumstances, such as a resemblance between the writing of the prisoner and that of certain anonymous letters received by the authorities upon the subject of the murder—proof of the pecuniary embarrassment of the prisoner, and his failure to account for his possession of sufficient money to pay to Dr. Parkman the amount due him upon the note found in the prisoner's possession, and which he said he paid—proof of Dr. Parkman's persecution of the prisoner and threats to expose him, as furnishing adequate motive to do the deed,—and proof of various other circumstances of more or less value, as sustaining the hypothesis of guilt, which we do not propose to stop to consider.

We cannot refrain, however, though it be apart from our design, from saying a few words in relation to the alleged proof of premeditation, and the government theory that the prisoner enticed Dr. Parkman to the College with a felonious design.

Were this theory possessed of any foundation, every student

in the lecture room of Dr. Webster on that day, would, of necessity, be a witness for the prosecution, or the prisoner is more than mortal. According to this theory, he was delivering a lecture upon chemistry to a class of young men, having designed and completed his arrangements to murder a fellow-being, at the close of his lecture, in the next room!—and that fellow being, a man of vast wealth, fully appreciated in that singular community, of which he was a member and a prominent feature!—and that fellow being, one of the founders and patrons of that very College within whose walls he had resolved to put out his light of life!! Is not this theory simply monstrous, in the absence of all evidence of the slighest abstraction of mind, suspension of ordinary functions, or variation from his every day conduct and manner, in this person who is described by witnesses innumerable, to be a mild, humane, and timid man?

We do not believe it to be a possible thing for any man who ever lived in a civilized community—with composure of spirit, with coolness of recollection, with quiet calmness of manner—to discourse for an hour upon a scientific subject, illustrating that discourse with experiments, for the purpose of teaching his auditors, while the fearful conflict of the passions is raging in his breast, heaving with the convulsive agitations of a laboring crime, and that crime, MURDER—

> "The thought whose murder yet is but fantastical,
> Shakes so the single state of man that function
> Is smothered in surmise, and nothing is
> But what is not."

We had supposed that there was some truth to nature in the description of the chief conspirator of Cæsar's death of the state of the mind which in the human constitution precedes the commission of unnatural deeds—

> "Between the acting of a dreadful thing
> And the first motion, all the interim is
> Like a phantasma or a hideous dream:
> The genius and the mortal instruments
> Are then in council, and the state of man,
> Like to a little kingdom, suffers then
> The nature of an insurrection."

While upon this subject, we cannot refrain also, from speaking of the evidence of the actions, deportment, and appearance of the prisoner immediately after the time when it is averred

that he killed Dr. Parkman. He went into the bosom of his family, joined a social circle, played whist, read aloud, conversed upon scientific subjects, and delivered his lectures, without a shade of change in his usual quiet cheerfulness of manner, which was discerned or discernible by any one about him. This fact, established in the conclusive manner in which it is, outweighs, when rightly considered, a host of such circumstances as the prosecution has pressed into its service to sustain the hypothesis of guilt. Cicero illustrates the peculiar force of the presumption of innocence from such a moral coincidence, by the relation of a case in which its application saved two young men from a most ignominious condemnation. "Cloelius," says he, "a man of some note, retired to rest in the same chamber with two youths, his sons, and was found, in the morning, murdered. There was no one, whether bond or free, that with the least reason, could be suspected of the crime; and the two sons, though they were in the same room, declared they had heard nothing. They were accordingly accused of parricide. What then? The transaction was suspicious. Was it to be supposed that neither of them knew what happened? Was it possible that any one had dared to enter the chamber, when there were in it two young men, sons of the person they intended to murder, who were both able to discover the attempt and to defeat it? There was, besides, no one else who could be suspected. Yet, when it was clearly proved that the young men on the opening of the door in the morning were found fast asleep, they were acquitted, and discharged of all suspicion; for it was thought impossible that any one could commit a crime so cruel and unnatural, and immediately sleep, but that a man thus atrociously guilty would not only be unable to sleep in quiet, but even to breathe without fear."

We have been unwittingly led aside from the main purpose of this discussion; and having once yielded to the temptation, we will continue so far as briefly to consider the force of some of the other circumstances most relied upon by the prosecution to sustain the hypothesis of the defendant's guilt.

First, as to the proof of Dr. Webster's inquiries of, and conversations with, the several witnesses—Littlefield, Trenholm, Mrs. Colman, Francis Parkman, Blake, and others, after the disappearance of Dr. Parkman and before the arrest, and of his manner at the time of these several conversations and inquiries. Much of this evidence, if regarded without due consideration of the peculiar position in which Dr. Webster was then placed, and of which he must have been most sensitively

conscious, would unquestionably have a tendency to support the hypothesis of guilt; but its force, to this end, is completely destroyed, and these several inquiries and conversations, and the manner of them, and the prisoner's own manner at the time, appear the most natural possible, and perfectly consistent with the hypothesis of innocence, when we consider that Webster was the debtor of Parkman, and he knew that the family and friends of Parkman were aware of this—that angry discussions had occurred between them in relation to this indebtedness—and that this was, or might be, a matter of notoriety—that he had appointed a meeting with him in relation to that indebtedness on the very day of his disappearance—that they had met—and that since that meeting the family had been unable to trace him, or learn of his having been in company with any other person.

Again: The evidence, that after the disappearance of Parkman, the prisoner was frequently in his laboratory, with the door locked upon the inside. Had this not occurred before, or even had it rarely before occurred, it is a circumstance undoubtedly tending to support the hypothesis of guilt; but it becomes wholly valueless for that purpose, when met by the testimony of several witnesses who declare that it was a common thing with Dr. Webster to be thus secluded; and perhaps there is no occupation in which such seclusion as precludes the possibility of being disturbed is more desirable than that of a chemist.

Again: The evidence that portions of a human body are actually found in the apartments of the prisoner, or in a vault communicating with those apartments, and no attempt is made by the prisoner to account for or explain this fact. This is a circumstance of a character strongly tending to support the hypothesis of guilt, if it be also proved that *no other person than the prisoner had access to those apartments;* but to this point, the evidence is to the contrary; and hence this circumstance at once loses the force of proof of a conclusive tendency.

Again: The evidence in relation to the anonymous letters. If the prisoner wrote those letters it would be a coincidence scarcely consistent with the hypothesis of innocence. But no one at all familiar with the administration of justice can be unaware that the presumption drawn from evidence of the comparison of handwriting, is the weakest of all presumptions. Ordinarily, but little reliance can be placed upon it; and it is only resorted to in aid of other circumstances. In this case, however, the force of the presumption, if it possessed any, is

quite destroyed by the disagreement between the experts who are called upon to establish it.

Again : The evidence in relation to the notes found in the possession of Dr. Webster, and money due upon them, which he alleges that he paid to Dr. Parkman on the day of his disappearance. The prosecution avers that the prisoner did not pay the money, and if he did not, his possession of the notes is a most pregnant circumstance scarcely to be reconciled with the hypothesis of innocence. The amount averred to have been paid was nearly $500, and, in aid of the allegation that it was not paid, there is evidence of the prisoner's pecuniary embarrassments, and of his limited resources, tending to show the strong improbability of his having in his possession so much money at that time. There is no evidence on the part of the defence accounting for the prisoner's possession of the money which he alleges to have paid. But he himself accounts for it by stating that it was money which he had been gradually accumulating, and saving at his residence, for a long while, without the knowledge of any person, and which he took from his trunk on the morning of Dr. Parkman's disappearance to appropriate to his payment. Now, is not this a most natural account? Is it an unusual thing for persons of narrow means and limited resources to lay by small sums of money in some secret place of deposit at their homes, that they may accumulate a sum which shall provide for some sudden domestic emergency ? And, that they may the more certainly effect this, is anything more natural than that they should impart to no person the secret of such a deposit ? We believe this to be an occurrence so frequent, that the personal experience of the great majority of persons with no income save that derivable from their daily avocations, whether professional or mechanical, would at once bear witness to it. Sad, indeed, would be the fate of thousands, were their lives or liberty dependent upon their being able satisfactorily to account, by competent proof, for their possession of money with which they yesterday discharged a pressing obligation, defrayed the expenses incident to a last illness, or presented as a marriage gift to a beloved daughter.

We have alluded to a few, only, of the most prominent circumstances. We believe that there are not any to which we have not alluded, which are less easily reconcilable with the hypothesis of innocence.

But we will now return to our original design. We have

set forth the facts which are admitted on either side, or not disproved. We have set forth the averments made by the prosecution and denied by the defendant, and the proof brought to sustain them, and it now remains, to complete our statement, to set forth the averments of the defence and the evidence adduced in their support. It is averred by the prisoner, 1st—That the portions of a body found in the Medical College were not parts of the body of Dr. Parkman—of course that the murder alleged was not committed by any one. And it is averred, 2d—That if the remains are those of the missing Parkman, his death was not caused by violence, or, if caused by violence, that such violence was not done by the prisoner. To prove the first of these averments, five witnesses are produced, who swear positively, and with great circumstantial detail, that they saw Dr. George Parkman, whom they well knew, and for many years had known, alive, and walking the streets of Boston, at a time after that when it is alleged he was murdered, and at a time after that when according to the whole theory of the prosecution, he must have been murdered, if at all. We will not comment upon the testimony of these witnesses. It is sufficient to say that they are credible, respectable and unimpeached. They swear positively, stating not only the fact, but the reasons why they remember the day and hour, and the circumstances enabling them to testify with the utmost certainty.

To sustain the second averment of the defence, the prisoner relies, so far as regards the first branch of it, upon the entire absence of all proof, by the prosecution, of a death caused by violence ; and, so far as regards the second branch of it, first, upon the total absence of all legal proof of the *corpus delicti*, and second, upon the evidence of his high and irreproachable character during a long life, and the utter inadequacy of the presumptive evidence to connect him with the murder, if any has been committed. And here closes our prefatory statement.

We commenced by saying that it was our design to show that the all-pervading sentiment of reprobation of the verdict in this case, had its origin in a sincere and intelligent conviction that that verdict could have been the result alone of a disregard or violation of the well established rules of criminal evidence. As a necessary introduction to that conclusion, we have something to say upon the subject of circumstantial testimony.

We are aware that, of late days, nothing has been more common than to animadvert with a wild severity upon circumstantial evidence as a dangerous and false medium of proof; and that many enthusiastic advocates of mild laws, less regardful of the interests and safety of the community than of the person of the criminal, have declared that in no case should circumstantial testimony alone be allowed to be conclusive of guilt, to justify conviction and punishment.

We believe that such sentiments can prevail only in connection with a very imperfect conception of the true character of circumstantial evidence, or an ignorance of the well-established rules of law which govern and control its conclusive influence in criminal proceedings.

We believe such sentiments as dangerous, too, as they are erroneous. The greater the crime, the greater the secrecy with which it is perpetrated, and therefore the least susceptible of direct proof. To require direct evidence to secure conviction, would be to announce the dissolution of society, and leave all crimes without restraint. It has been gravely asserted that circumstantial evidence is liable to the double uncertainty proceeding first, from the danger of perjury by the witnesses who swear to the facts, and second, the mistakes of those who are to reason upon and compare the facts supposed to be proved, whereas direct evidence is subject only to the former uncertainty. This is fallacious. Human ingenuity is not equal to the invention and contrivance of a series of false and feigned circumstances, each agreeing perfectly with the other, and all agreeing with all other known collateral circumstances. To do this, a foresight and vigilance is requisite for which no mind is competent; for bring a stubborn truth into contact with the best and most skillfully constructed edifice of falsehood, and down comes the building. When the circumstances proved are numerous, and testified to by different witnesses, and together form a connected chain of evidence, and every new discovery falls easily in and connects itself with what was before known, there remains scarcely a possibility of deception by perjury or imposture. We believe, then, that a variety of circumstances thus sworn to, each and all concurring to establish the hypothesis of guilt, and to be accounted for upon no other hypothesis, affords a much surer and safer basis for conviction than the positive declaration of any witness to the actual perpetration of the crime.

We have said that the sentiment of opposition to circum-

stantial evidence, as a medium of proof to justify conviction in criminal cases, can only prevail with those who are ignorant of the rules, now perfectly established, which control its conclusive operation in the administration of criminal justice. That we are correct in this assertion is apparent from the character of the cases which are periodically paraded as illustrative of their views, and to enforce their doctrines. By reference to these cases, it will be found that the erroneous conviction of the prisoners was, in all of them, the direct result of the violation of some one or more of the now fundamental rules of the law of criminal evidence, in relation to the proof of crimes by circumstantial testimony.

Now, what are these rules ?

We shall endeavor to state them with legal accuracy. We shall then cite some of the leading and prominent cases of erroneous convictions upon circumstantial evidence, relied upon by the opponents of that medium of proof as the sole basis of conviction, and show that such convictions have resulted from the violation of one or more of these rules. We shall then point out such an analogy between these cases of erroneous conviction and the case before us, as will establish, we firmly believe, to a degree of certainty not less than demonstrative, that the verdict of the jury in the late trial of John W. Webster, for the murder of George Parkman, was the result of the violation of one or more of the well established rules in the law of criminal evidence ; and that had those rules of law been correctly declared by the Court, and observed by the jury, a verdict of Not Guilty must have been the result.

The rules are as follows :

First.—*The circumstances from which the presumption of guilt is to be drawn, must themselves be fully established.*

Second.—*All the circumstances proved must be consistent with the hypothesis of guilt, if any one established fact be wholly irreconcilable with that hypothesis, the hypothesis must be rejected.*

Third.—*The circumstances proved must be of a conclusive character and tendency.*

Fourth.—*The circumstances must, to a moral certainty, actually exclude every other hypothesis but that of guilt.*

Fifth.—*The proof of circumstances, however numerous, of a tendency, however strong or conclusive, to indicate guilt, avails nothing, unless the fact that the crime has been actually perpetrated be first established.*

Sixth.—*The fact that the crime has actually been committed by some one, must be proved by positive and direct evidence, and in such a manner that there is not the least doubt as to the act, for so long as there exists the slightest doubt as to the act, there can be no certainty as to the agent.*

These are the rules, in relation to circumstantial evidence, in the administration of criminal justice, which have been established by a wisdom enlightened by the experience of ages. As firmly established are they, as is that rule which declares the presumption of innocence until guilt be proved, or that other humane maxim of our law—that it is better that ninety nine (*i. e.*, an indefinite number of) offenders should escape, than that one innocent man should be condemned. There is nothing arbitrary in the principles upon which these rules are founded. There is nothing artificial in their structure. They are not authority merely, but reason; not law alone, but truth, and nature and morality. They have been erected as sea marks, monuments, beacon lights, to guide the administrators of public justice, in an ocean of circumstantial proof, to the only true channel through which they may safely sail into the harbor of conviction.

We will now briefly consider some of the prominent cases of erroneous convictions upon circumstantial evidence, relied upon by those who contend that such a mode of proof should in no case warrant conviction.

The leading case is cited by Lord Hale. A young lady had been cruelly treated by her uncle, who was her guardian. He had been seen to abuse her, and heard to threaten to kill her, and she was heard to exclaim, "Uncle, don't kill me!" She suddenly disappeared. There was a strong probability that she had been murdered by her uncle; and this probability was strengthened by the fact, that upon her death, without heirs of her body, he would come into possession of a large estate. He was arrested, arraigned before a judicial tribunal, and commanded to produce his niece. The weak-minded man, to screen

himself from punishment, produced a girl who very much resembled his niece; but the fraud was detected, and this circumstance increased the probability to a confidence of his guilt, and he was convicted. The young lady, who had eloped to escape her uncle's cruelty, returned too late to save him from execution. This case is, perhaps, more frequently and more exultingly relied upon than any other as a strong instance of the fallibility of presumptive evidence. But recur to the *fifth* and *sixth* of the Rules of Law, which we have just enumerated, and observe how directly were they infringed. Not only was there no direct and positive evidence of the actual commission of the crime, but there could have been no proof at all of its perpetration by any one. The unfortunate result in this case was thus the direct consequence of the violation of the fundamental rules of law which control the conclusive tendency of circumstantial evidence.

In 1642, one Thomas Harris was tried at York (England) for the murder of one James Gray. Harris kept a public house, and Gray was his guest. A great number of circumstances were proved, all tending to establish the guilt of Harris at the trial. The prisoner had concealed in his garden a quantity of money, on the day of the supposed murder of Gray, and this money was identified as the money belonging to Gray. A servant in the house swore to a violent altercation between Harris and Gray. There was not, however, upon the body of the deceased person, the *slightest mark of violence*. He was convicted and executed. The servant subsequently confessed that Gray died of apoplexy—that he (the servant) was aroused by the noise of the dying convulsions of the deceased, and reached the room just in season to witness his last moments. He hastened to inform his master—could not find him—and after a while returned, and hearing a slight noise in the room, looked through the keyhole, and saw his master rifling the pockets of the deceased. Here, too, as in the preceding case, it is equally apparent that the unfortunate result was occasioned by a like disregard of these same rules.

There could have been no proof whatever that a murder was committed at all. There was in this case also a glaring infringement of the *second* of the above enumerated rules. The fact proved that there was *no mark of violence* upon the body of the deceased person, was *wholly irreconcilable* with the hypothesis of murder, and therefore that hypothesis should have been rejected.

Mr. Starkie relates a case which, he says, occurred some years before he wrote his book on Evidence:—

A servant girl was charged with the murder of her mistress. The circumstantial evidence was exceedingly strong. No person was in the house, save the murdered mistress and the prisoner. The doors and lower windows were all closed and perfectly secured, and so found, the day following the murder. There were many other circumstances occurring, precedent and subsequent to the murder, all tending to fasten guilt upon the accused. She was convicted and executed. The real murderers subsequently confessed that they gained access to the house, which was in a very narrow street, by walking upon a plank thrust from an *upper* window of the opposite house into an *upper* window of the house of the deceased—that they retreated in the same manner, and left no trace behind them.

Now turn to the *fourth* of the preceding rules of law, and observe how recklessly that was violated, and how obvious it is that the poor girl was executed solely in consequence of that violation.

Did the fact, in evidence, that the doors and *lower* windows were closed and fastened, exclude every other possible hypothesis than that of the guilt of the servant girl, who alone dwelt in the house with her mistress? Surely not, unless it could also have been shown (which the subsequent disclosures proved to be impossible) that there was no other possible mode of access to the house.

Perhaps a more remarkable case of erroneous conviction upon circumstantial evidence never came under the cognizance of a judicial tribunal than one which occurred about thirty years since in our own country.

Two brothers, by name Boorn, were arrested in Vermont, in the year 1819, charged with the murder of one Russel Colvin. They were tried upon an indictment for the offence in the Supreme Court of that State, we believe at Bennington. The presumption of guilt was violent, drawn from many circumstances proved by different witnesses. They had quarreled with Colvin, and threatened his life. Nay, they were actually seen in violent personal contest with him, in a field, on the day of his disappearance. His disappearance was scarcely noticed at the time, for Colvin was a poor man: no one cared for him alive, and no one was interested to prove him dead. Some

time after, however, bones were discovered, in a pit or natural hollow, in the field where the quarrel had been witnessed, and near the very spot of the supposed fatal altercation. These bones were identified as "not dissimilar" to such as might have composed the body of Russel Colvin. In the same pit were also found a knife and one or more buttons, and the former was identified as having belonged to Colvin; and the latter, as having been attached to his garments; and as a full compensation for the absence of artificial teeth to identify in this case, the prisoners *actually confessed* that they were guilty of the murder. They were convicted and sentenced to death; but, thank God! the annals of our criminal jurisprudence are not stained with the crime of judicial murder by the execution of that sentence; for poor Russel Colvin was all this while alive—was discovered as a farm laborer in New Jersey, whither he had wandered after his altercation with the Boorns, which they really supposed had resulted in his death. He was brought back in season to save the lives of the convicts.

The mysterious circumstances of this case caused many to believe that no adequate and safe means existed for the detection and punishment of crimes which no human eye beholds, and that in all capital convictions, whatever may be the extent or nature of the proof, there is the greatest danger of involving the innocent with the guilty. But, once more recur to the rules of law. Mark the palpable violation in this case of the *fifth* and *sixth* of those rules. Was the crime of murder proved to have been committed? No; for the man alleged to have been murdered was walking above ground. Was it even attempted to be proved by direct and positive evidence, as is required by the sixth rule? No; for the only evidence in the case tending to show that Russel Colvin was dead, was circumstantial, merely. The fact was sought to be inferred by proof of resemblances between the bones found and such as might have made the frame of Russel Colvin's body—and the identification of the knife and buttons found with the bones, as Colvin's property—and it would have been precisely the same if hair or artificial teeth had been found—it would have been simply a fact or facts proved, from which the fact necessary to be proved was to be inferred or presumed—and therefore circumstantial evidence. Now, it is obvious enough, that this case, remarkable though it be, affords no just ground for the animadversions of those who inveigh against circumstantial evidence as a mode of proof to justify convictions. It is only

another of those cases in which, through prejudice, or carelessness, or ignorance, the circumstances proved were allowed to operate as conclusive of the guilt of the prisoner, in violation of the inflexible rule which declares, that the circumstances proved, however numerous and strong they may be, and however they may all tend so to establish guilt, that "the probation bear no hinge nor loop to hang a doubt on," shall avail nothing—absolutely nothing—unless it be first established by direct and positive evidence, and that, too, beyond the least particle of doubt, that the crime has been actually committed by somebody.

The wisdom and policy of this rule is attested by all experience. The justice and reason of the rule, a little reflection will make apparent.

If it be first proved, beyond any doubt, that the crime has been committed, then the commission of the crime may properly serve to explain and account for the attested circumstances; but, the act never having been proved to have been done, by a process, as illogical as it is dangerous, the circumstances are made to prove the fact, and the fact made to account for the circumstances. Let the absurdity of this be made more manifest, if possible, by illustration—as thus: The existence of a river accounts for the existence of a bridge, but most assuredly does not prove it. Or thus: Chief Justice Shaw's possession of all the books of authority upon the subject of criminal evidence, might serve to *account* for his being a profound criminal-law lawyer—but who would pretend that it *proved* it? That must be done, if attempted—*aliunde*—but Heaven preserve us from the attempt!

It remains to point out the analogy between these cases of erroneous conviction, and that of John W. Webster for the murder of George Parkman; and thereby to make it as apparent as the noon-day sun, so that he who runs may read, that the latter, like the former, was the direct and necessary consequence of the palpable violation of the rules of law which control the conclusive character of circumstantial evidence. It will be apparent from what we have before written, that it is not pertinent to our argument to consider whether in this case, the circumstances, from which the presumption of guilt was to be drawn, were fully established, nor whether all the circumstances proved were consistent with the hypothesis of guilt, nor whether

the circumstances proved were of a conclusive character or tendency, nor whether the circumstances excluded to a moral certainty every other hypothesis than that of guilt.

Our argument rests upon the *Fifth* and *Sixth* rules in the order of our enumeration, and upon them alone. They are the most important of all—they are at the foundation of all. They are the rules which define and limit the force and effect of circumstantial evidence, and declare the circumstances under which that character of evidence, however irresistibly conclusive it might otherwise be, shall yet avail nothing. Although we were tempted a while since to step aside from our main design, for the purpose of considering the most prominent circumstances relied upon, and showing, that to our mind, they failed in excluding to a moral certainty every other hypothesis than that of guilt; yet, we are free to admit, and we will not say, "for the sake of the argument merely," but we are free to admit, that the circumstances proved are strong—exceedingly strong. We will go farther, and say, that had the foundation been laid, to provide for their conclusive tendency, which the wise and inflexible rules of law most imperatively require, we should have acquiesced in sad silence in the judgment of those who declared, that guilt was proved beyond a reasonable doubt. But that foundation was not laid. Those rules of law were not only not regarded, but were so directly violated—so boldly, and without any apparent resistance or opposition, set at naught—that the heart sickens when we read all that was said and done in defence of the prisoner by his counsel; and we turn from the perusal of the part enacted in that drama by the Judge, who dictated their verdict to the Jury, with an indignant amazement. Indignation that the Judge should have been allowed, without a word of disapproval, or a breath of resistance, thus to mis-state and mis-direct the law, and so to argue against the prisoner upon the facts. Amazement, that a judge exists, capable of such a performance, in this high noon of the nineteenth century of Christ, and in the heart of the Commonwealth of Massachusetts.

For the defendant's counsel we feel that pity which forbids all bitter reproof, all harsh denunciation; that pity which all naturally feel for those who, rashly, though it may be with the purest motives, undertake a duty, for the performance of which they are utterly unfitted either by nature or education. In this respect we are unable to perceive any difference between the junior and the senior counsel. We have no acquaintance with either

of the gentlemen, but have been informed that they are worthy and useful citizens in other spheres. If this be so, we trust that their lamentable failure in this, may not impair that usefulness; but sure we are, that should they live to be as old as Methuselah, their services as criminal lawyers, will never again be put in requisition.

For the jury we have simply no feeling at all. They did as they were told to do, and no doubt considered that in doing so, they did their whole duty; with many prayers to be sure they did this, but without a moment's independent deliberation, or a murmuring word. They have given us the *modus operandi* in a letter since written by their chief Dogberry. In this they have written themselves down, "asses," in staring capitals. True they have also written down, "that they hope they serve God," and have written "God, first;" but (to trace the Dogberry similitude a little farther,) it is quite apparent that they first sat down in the jury box fully prepared to say to the prisoner, "Master, it is proved already that you are little better than a false knave, and it will go near to be thought so shortly."

But enough, and too much of this. It remains to speak of him who moved these puppets, and told them when to speak and what to say.

Strong language is this we use, and stronger we intend to use; but it is dictated, (and of this Heaven be our judge!) by no personal feeling of hostility towards those whom we condemn, nor of partiality nor even pity for him whom they have condemned. We have no personal acquaintance with any of them, nor, to our knowledge, with any friend of any of them. Our information of the incidents of this trial, and of the charge of the judge, is derived from four different pamphlet reports, now lying before us. They bear that stamp of correctness indicated by substantial agreement, with immaterial variation, and in one of them it is declared that the published "charge of the Judge" has been "revised" by the Court. We say this, because, knowing as we do the little dependence which can ordinarily be placed upon mere newspaper accounts of such proceedings, we would not venture to write as we have written, and as we design to write, without a much more reliable text for our commentary.

But, with all the evidence before us, it seems scarcely credible that Judge Shaw could have given utterance to the language published as his "charge to the jury." From the beginning to the end it is but an argument against the prisoner. Proceeding from the Bench, it is an argument with all the moral force of a positive dictation to the jury; a dictation which made the pre-

tended trial by *twelve* men a farce and a mockery. The circumstances proved by the prosecution, are so stated by the Court as to invest them with an absolutely conclusive character and tendency, while those relied upon by the defence, as inconsistent with the hypothesis of guilt, are only alluded to for the purpose of informing and directing the jury, either that they are not satisfactorily proved, or, if proved, are of so little importance as to be unworthy their consideration. What ulterior purpose was to be accomplished, or what feeling of interest or resentment was to be gratified by such an extraordinary judicial usurpation as this, we do not pretend even to conjecture ; but we do not hesitate to declare, that to find a parallel for such an unscrupulous prostitution of dignity, such an unblushing betrayal of the sanctity of the judicial office, we must go back to the days of Jefferies.

We are wont to speak and think, with just pride of the humane maxim and rule of our law, which declares that "every man is presumed to be innocent until he is proved to be guilty," and provides that the proof of guilt shall be such as to exclude every reasonable doubt. But the humanity of our law was outraged by the judicial reversal of this rule against the prisoner. Not once only, but repeatedly, are the jury informed by the Court that it is *incumbent upon the defendant* to prove his defence *beyond a reasonable doubt*. A part of the defence consisted of the evidence of five witnesses to the fact that they saw the supposed deceased person walking in the streets of Boston at a time wholly inconsistent with the hypothesis of guilt. This was, most improperly, called the *alibi* of Parkman, and with reference to this, the Judge says, " an alibi is set up, and, if proved *beyond a reasonable doubt*, it is a good defence ;" and, then, after proceeding to argue (and with more force than the prosecuting counsel argued the same point) that these five witnesses (although they swear with the greatest precision, and circumspection and certainty, and were worthy and respectable and unimpeached witnesses, familiar, by long acquaintance, with the peculiar person of Parkman) yet must have been mistaken or perjured. The judge again declares—" To establish this *alibi*, the proof must be *beyond a reasonable doubt*."

The manifest tendency of the positive evidence of these five witnesses was to disprove the circumstantial evidence of the *corpus delicti ;* but the judge tells the jury again and again that they " must *weigh* this evidence with that introduced upon

the other side." Now, we read in every elementary treatise upon the Law of Evidence—in Phillips*, in Starkie†, in McNally‡, in Roscoe§—that in criminal cases, where the question is as to the proof of the *corpus delicti*, or actual commission of the crime, "*it is an established rule that the jury are not to weigh the evidence, but, in cases of doubt, to acquit the prisoner.*" The assertion, that upon this question there is evidence *to be weighed*, necessarily carries with it the assertion that there is a doubt, and involves the absolute necessity of acquittal.

Let it not be supposed that the doubt here required is a reasonable doubt; not at all. It is any doubt—the slightest doubt—for the language of the law is so plain as not to be misunderstood, it is thus written: "The fact that the crime has been actually perpetrated must be *first established*, the coincidence of circumstances tending to indicate guilt avail nothing, however strong or numerous they may be, until it is *first established.*—It must be *distinctly proved*, by *direct* evidence, or by *actual inspection* of the body. *So long as the* LEAST DOUBT *exists as to the act, there can be no certainty as to the criminal agent.*" —1 Starkie, 512.

Now, if this be the law, and we affirm that it is, and defy contradiction, then we maintain that the direction by Judge Shaw to the Jury, qualified, or modified, or "revised," as it may be, and viewed in the most favorable light possible, was a direction in utter violation of the law, and a direction without which the prisoner must have been acquitted. We do most unhesitatingly affirm that no intelligent person can read the language of the Court, without being convinced of the truth of our assertion, as completely and satisfactorily, as of any fact ever demonstrated to the human mind. The law is so clearly established and so plainly written, and its wisdom has been so often and so singularly illustrated by cases, some few of which we have cited, that it would seem scarcely to be credited that it was not familiar to the Chief Justice. Yet, is it charitable to believe that he did not sin against knowledge? We are not desirous, by anything that we can say, to cause the good people of Boston to be ashamed of their credulity; we therefore say, with them, that it should not be considered possible that a

* 1 Phil. Ev., 166.
† 1 Stark., 512.
‡ McNally, Pl. Cr., 573.
§ Roscoe, Crim. Ev., 13.

learned judge of Massachusetts can act in direct and wilful contradiction to those laws which he is supposed to have made the study of his life, and which he has solemnly sworn faithfully to administer.

But where do we find upon the face of the judicial charge a single direct statement of the existence of those fundamental rules of the law of criminal evidence, the *fifth* and *sixth* in our preceding enumeration? Such a statement is nowhere to be found. There may be a casual and ambiguous intimation of the existence of the fifth rule; but the jury are directly informed throughout, that the actual commission of the crime may be proved by circumstances; and, substantially, that the circumstances proved, tending to connect the prisoner with the crime, may serve to prove its actual commission; and that it is sufficient if the actual commission of the crime by some person is proved beyond a reasonable doubt. And yet, the rules of law most peremptorily declare "*That the proof of circumstances, however numerous, of a tendency however strong or conclusive, to indicate guilt avails nothing, unless the fact that the crime has actually been committed be first established;*" —and "*The fact that the crime has actually been perpetrated by somebody, must be proved in such a manner and by such evidence that there is not the least doubt as to the act; for so long as there exists the slightest doubt as to the act, there can be no certainty as to the agent.*" We have seen that this is the law. Now, let us suppose, that Judge Shaw had performed that duty, that simple duty, which the oath of God had imposed upon him, and truly declared to the jury the law as it is written, what then would have been the result? The jury could have had no occasion to leave their seats for deliberation: they must at once have acquitted the prisoner. Their pious ammunition would have been husbanded for some future occasion. Tears might have been shed—but not of pity—tears of regret, perhaps, that the inscrutable decrees of an all-wise Providence had for ever obliterated that proof which human wisdom has declared shall be an indispensable prerequisite to conviction.

We shall so present and establish this position as to leave no room for doubt, or mistake, or misunderstanding. To do this requires some labor and attention; but very little genius or sagacity. We must solicit the patience of our readers: This is no light matter. Did it but involve the fate of one or of one thousand fellow-mortals, its importance would be comparatively

insignificant; but it involves the supremacy of law, and the purity of the administration of public justice. It is not a question of private right, but of public freedom.

We ask, What was the evidence of the *corpus delicti* produced at this trial? It was all circumstantial—avowedly circumstantial. It was the proof of facts, from which the perpetration of the crime of murder was sought to be inferred. Thus, Dr. Parkman was missing. He was at the Medical College on the twenty-third day of November, 1849, at half-past one o'clock. He has not since been seen by his family. Bones and portions of a human body, so mutilated and disfigured that positive identification is quite impossible, are found at the Medical College. Anatomists swear that they are "not dissimilar" to such as might have been part of the body of Parkman. Fragments of hair, scorched and discolored, remain upon the breast. The brother-in-law swears to the resemblance of this hair to that upon the breast of Parkman. Three or four mineral teeth are found in a furnace, not far from the place where the bones and portions of the body are discovered. They have been subjected to a heat so intense, as to consume nearly every vestige of the bones of the head which is supposed to have contained them. A dentist swears that they are of his manufacture, and that he made them for Parkman. A hole is perceived in the flesh of the thorax which was found; but whether such a hole as might have been made by a knife to cause death, or such as might have been made by the stick of one of the officious officials who discovered the remains, was left in doubt by the witnesses for the prosecution. These are the facts—and all the facts in evidence—from which the *corpus delicti* is to be presumed—viz: that the remains found at the College were those of the body of George Parkman, and that he had been murdered by somebody. We think we hear the worthy Dogberry jurors exclaim—"What! do you pretend that we cannot consider the facts, that Webster enticed Parkman to his rooms under pretence that he wished to pay him what he owed him, when he had no money to pay—that Parkman had been savagely relentless in his importunities for payment, and had threatened the exposure of Webster for an alleged dishonesty in contracting the debt—that Webster's knife is found with portions of the body, and Webster's bloody napkins with other portions—that Webster was often inside his laboratory, with the door locked, after Parkman was missing—that Webster made mysterious purchases of twine

and fish-hooks, and a tin box, after Parkman was missing, and mysterious inquiries as to the character of the vault beneath the College before Parkman was missing;—do you pretend to say that we cannot consider each and all of these facts as so much proof that the crime has in truth been committed?"

We do so pretend to say. And we pretend to say that no person possessed of any knowledge of criminal law will for an instant gainsay the truth of our assertion. Did the Judge thus directly inform the jury? Far from it. His entire language is such as most amply to justify such exclamations from them as we have written. No positive instruction was given by him to lead the jury to suppose that they had not as perfect a right to presume the actual commission of the crime, from the circumstance, for instance, that Webster had not the money to pay, which he pretended to have paid, to Parkman, as from the dentist's testimony, or from any other fact proved, or supposed to have been proved, in the case.

The reader, we are sure, cannot have failed already to perceive the very striking analogy between this case and the cases of erroneous conviction upon circumstantial evidence which we have detailed. Let us take the strongest of these cases—that of the Boorns—for the purpose of tracing out the analogy more closely.

No one will venture to deny that the conviction in that case was erroneous. Why? Not because the prisoners were innocent, but because they were not proved guilty in the manner required by law. What was the proof of the *corpus delicti?* It was wholly circumstantial. Bones were found near the place where the prisoners and Colvin were said to have quarreled, and these bones are sworn to as "not dissimilar" to such as might have belonged to the body of Colvin. How perfect the analogy! Bones are found in the building to which, it is said, Webster enticed Parkman with a felonious design; and these bones are sworn to as "not dissimilar" to such as might have belonged to the body of Parkman. Near the bones found in the field in Vermont are also found a knife and buttons, sworn to and identified as the property, and attached to the garments of, Colvin. Again—mark the analogy!—near the bones found in the Medical College in Boston are also found some artificial teeth, sworn to and identified as the property, and attached to the jaws, of Parkman. That Colvin's knife and buttons were identified, was beyond doubt. Whether the teeth, under the circumstances in which they were found, were susceptible of

identification, was a question upon which the dentists differed. "The interesting inquiry," as the Judge terms it, whether the false teeth could or not be identified, bore the same degree of similarity "to the investigation of what are called fossil remains," as that of the identification of the knife and buttons.

Here is the entire evidence of the *corpus delicti* in either case. Was it any less strong and conclusive in its tendency in the case of the Boorns than in the case of Webster? On the contrary, was it not much more so? And yet it has ever since been conceded that the evidence in that case was insufficient to justify conviction, because, by the rule of law, the presumption of guilt could not be inferred from the circumstances connecting the prisoners with the supposed murder, however numerous and irresistibly strong they might be, without first proving, beyond the least doubt, its actual perpetration, by positive testimony. If this were not so, it would be impossible to answer the triumphant citation of this case of the Boorns, as proving most conclusively that there can be no safety in convictions based on circumstantial testimony in any conceivable case.

Upon this point, what says Chief Justice Shaw? We quote from the charge which the publisher says has been "carefully corrected" by him; for we intend that there shall be as little ground for suspecting the correctness of our premises, as for questioning that of our conclusions.

The Judge says: "This, gentlemen, is a case in which a person suddenly disappears; in which evidence is laid before you to show that he was deprived of life at or about a particular time, under such circumstances as to lead to a strong belief that some person or other had done the act which led to the result. Now, this is to be proved by circumstantial evidence."

Now, we affirm that this is not law; that this may not be proved by circumstantial evidence; and that Chief Justice Shaw can find neither authority nor precedent for his assertion. We further affirm, that the well settled law is precisely the reverse of that stated by the Judge; and that it requires, in cases of homicide, direct and positive evidence of the actual perpetration of the crime by some person, or the actual production and inspection of the body.

If we are right and Judge Shaw is wrong in this matter—so

paramount is its importance—Dr. Webster should be at this moment as free and unmanacled as the Chief Justice.

There is no attempt on the part of the judge in this instance to "verify his position" by reading any passage from any work —although "*in re non dubia*" he is free enough in his use of "*testibus non necessariis;*" and reads at great length upon the distinction between murder and manslaughter, from the work of a gentleman who became, after he wrote his book, as Judge Shaw informs the jury, "one of the judges in India"—whether at Singapore or Calcutta, the Judge did not say; and, therefore, unless the jury address to him a note asking further instruction upon that point, they must be content with the interesting information that the writer of the book was a judge afterwards, somewhere in India.

But, although no authority is cited in verification of the position, there is an attempt, a little farther on, to give to the jury the reasons why "the *corpus delicti* may be proved by circumstantial evidence." He says: "The necessity of resorting to circumstantial evidence is absolute and obvious. Crimes are secret; most crimes seek the security of secresy and of darkness: it is therefore necessary to use another mode of evidence than that which is direct, provided there is another mode; and, thanks to a beneficent Providence, there is furnished a means of proof, in another way, which is quite as strong and satisfactory as that arising from the direct testimony of a witness."

These are the reasons, obvious enough, given in all the elementary treatises on circumstantial evidence for resorting to that mode of proof to connect the person accused with the perpetration of the offence, but these reasons have no application whatever to the proof of the actual commission of the crime by some person. Because crimes are always secretly committed, and therefore are not susceptible of direct proof, is the best reason in the world for resorting to indirect proof to establish guilt; but no reason at all for resorting to it to prove the commission of the crime. A. B. is charged with the murder of C. D. Because the crime was done in secrecy and darkness, and no human eye saw it, is reason enough why you should be allowed to prove A. B. guilty by circumstantial evidence, but none at all why you should be permitted to prove that C. D. is dead, by the same kind of evidence. In other words, the secrecy

with which crimes are committed tends only to affect the proof of the criminal *agent*, not of the criminal *act*. So the *reason* of the Chief Justice fails entirely. Now let us look at his *law*.

We shall not lengthen this discussion by an unnecessary accumulation of legal authority. It is not a question of weight of authority, and none being cited to verify the position so unhesitatingly asserted by the judge, it is quite sufficient if we refer, in support of our position, to one work upon the subject of criminal evidence, universally admitted to be of the highest authority. We believe that the work of Mr. Starkie, upon the "Law of Evidence and Proofs in Civil and Criminal proceedings," is acknowledged to be a work of standard excellence; it is one of the text-books of the law student, and is, perhaps, oftener referred to by lawyers, and relied upon by judges, than any other work upon the law of evidence. We regret that we are not able to state that Mr. Starkie, after writing this book, became a "Judge in India," for, if our recollection serves us, he was not sent abroad, but his services in the administration of justice were secured at home. But, be this as it may, we quote from Starkie:

"UPON CHARGES OF HOMICIDE, IT IS AN ESTABLISHED RULE THAT THE ACCUSED SHALL NOT BE CONVICTED UNLESS THE DEATH BE FIRST DISTINCTLY PROVED, EITHER BY DIRECT EVIDENCE OF THE FACT, OR BY INSPECTION OF THE BODY: A RULE WARRANTED BY MELANCHOLY EXPERIENCE OF THE CONVICTION AND EXECUTION OF SUPPOSED OFFENDERS, CHARGED WITH THE MURDER OF PERSONS WHO SURVIVED THEIR ALLEGED MURDERERS." 1 *Starkie on Ev.*, 446 of the fifth American Ed., 512, margin.

This we affirm to be the law of England, the common law of Massachusetts, as much binding in Massachusetts as the law of its own legislature, adopted when the ancestors of Judge Shaw settled in Massachusetts; successively adopted since that time, and introduced into the constitution of that state, and never doubted or denied from the time of Lords Coke and Hale, inclusive, down to the time of Chief Justice Shaw, exclusive. But Judge Shaw denies this, and to meet the peculiar nature of this case, Judge Shaw manufactures a substitute for this law, and informs the jury that they are at liberty to infer the death of Parkman, from the circumstantial evidence!

But this is not all. Not only does he direct the jury that they may infer the death of Parkman from the circumstantial evidence, but he also tells them that it is sufficient if the circumstances proved, satisfy them of the death of Parkman *beyond a reasonable doubt*. We again quote the language of the judge in the charge, "corrected" by himself. "They (the circumstances) must prove the *corpus delicti*, or the offence committed—the fact that the crime has been committed. The evidence must prove, not only in a case of homicide or death by violence the hypothesis presented, but, to a reasonable extent, it must exclude a reasonable hypothesis, by suicide, or by the act of another party, this is to be proved beyond a reasonable doubt." It may be difficult to say what is the precise meaning of all of this proposition. The only thing which is quite clear, and perhaps it is all which was intended should be quite clear in it, is this, that, if the circumstances proved do, to a reasonable extent, satisfy the jury beyond a reasonable doubt, that the crime has been committed by somebody, that is sufficient evidence of the *corpus delicti* to answer the requirements of the law.

This again is law manufactured for the occasion. It is not the law of the land. It is not the common law of England. It is not the law of Massachusetts. It will be found nowhere but in the charge of Chief Justice Shaw. To verify his position he cites no authority, for the simple reason that none exists to verify it.

We affirm that the law requires absolute, conclusive proof of the *corpus delicti;* proof beyond any doubt, proof as certain as if the jury themselves saw the body, and identified the body, and there were no dispute about it. In support of this we again quote from the same author :

"THIS IS THE RULE IN CRIMINAL CASES, THAT THE COINCIDENCE OF CIRCUMSTANCES TENDING TO INDICATE GUILT, HOWEVER STRONG AND NUMEROUS THEY MAY BE, AVAILS NOTHING, UNLESS THE CORPUS DELICTI BE FIRST ESTABLISHED. SO LONG AS THE LEAST DOUBT EXISTS AS TO THE ACT THERE CAN BE NO CERTAINTY AS TO THE CRIMINAL AGENT." 1 Starkie on Ev., 446—512 margin.

We might multiply quotations further to sustain this position. We might illustrate it by the authority of innumerable

reported decisions; but we have already extended our discussion much beyond our original design, and we must be pardoned, if it be temerity to suppose, that it is quite sufficient to oppose the unsupported dictum of Judge Shaw, with the authority which we have cited.

The *corpus delicti* must be proved with absolute certainty, beyond the least doubt; when that is done, then you may prove the prisoner to be the guilty agent, beyond a reasonable doubt. Such is the law. But it was essential to the conviction of Dr. Webster, that such should not be the law of this case; for no man would dare to say—no one of the jury—not the prosecuting officer—no, not even the Judge, would dare to say that the death of George Parkman by violence, or even his death at all, was proved with absolute certainty, beyond any doubt, and this even without considering any other evidence than that of the prosecution. But when we take the testimony of the five witnesses, credible, unimpeached—who distinctly, positively, circumstantially, swear that they saw Parkman, at different times, and in different places, after the time he was alleged to have been, and must have been murdered, if at all—we presume it would be as difficult to find a person in Boston who would say that the death of Parkman was proved with absolute certainty, beyond any doubt, as it would be, out of Boston, to find one who would say that it was proved beyond a reasonable doubt.

Upon this point, then, had the Judge performed his duty, and correctly instructed the jury upon the law, as it is written, the prisoner, at this moment, would be as free as the Judge.

At the commencement of this discussion, we stated that it was our design to show, that the sentiment of reprobation of the verdict of the jury in the trial of John W. Webster for the murder of George Parkman, which pervades our whole community to an extent approaching universality, was the offspring of a deep, sincere, and intelligent conviction, that that verdict was the result, and could only have been the result, of an utter disregard of some, and a palpable violation of others, of the well-established rules of law, which govern and control the force and conclusive influence of circumstantial evidence in the administration of criminal justice.

Is not that design accomplished? We promised to show this

to a degree of certainty not less than demonstrative. Have we not fairly and faithfully fulfilled that promise? For an answer to this question, we confidently appeal to every intelligent reader, wherever and whoever he may be: we care not whether he be impartial; we care not whether he be unprejudiced; all that we ask is that he be intelligent, and we know that he must affirmatively answer these questions, without hesitation, though it may be, not without reluctance.

Our task is now performed. It has been no pleasant one to us; for we are not of that disposition to seek or find gratification in the exposure of dereliction in high places. We have performed our task without fear, without favor, and with no hope of other reward than that which attends the consciousness of the performance of a duty. To one of that profession to which we belong, we know no earthly duty higher or holier, than that which bids him stand, as it were, a sentinel upon the outposts of the administration of public justice, to sound the alarm with such voice as the GREAT FOUNTAIN OF ALL JUSTICE has given him, at the first, and at every attempt to storm the citadel, or to lay a rash hand upon any one of those safeguards which has been erected for the protection of the lives or liberties of the citizen.

In the performance of that duty, we now turn to the Executive Government of the Commonwealth of Massachusetts. With that tribunal remains the ultimate power of averting the blow which has been aimed at the integrity of our criminal jurisprudence.

We call upon that tribunal, not in the name of Massachusetts alone, but in the name of the whole nation, to stand forth in defence of the common law of the common land. The citizens of each State have equal interests here with the citizens of Massachusetts; and, although you are but the Executive Government of one State, you are placed in a position where the power with which you are entrusted may be exerted for the benefit of the whole country. We appeal to you to exert that power. Let not this case stand as a precedent upon the record of our country's jurisprudence. Wipe out the stain by a solemn declaration, that your interposition is based upon the conviction that that record would never have been written, but for an unwarrantable departure from the well established law of the land. We make no appeal to your sympathy; we

ask not the exercise of your clemency; for, if what we have written be not written in vain—and our arguments carry with them the force of truth—our appeal is to the sense of right and justice through the understanding alone.

But there is one view of this matter which we do not feel at liberty entirely to disregard. It may be that what has been written may serve only to raise a doubt in your minds as to the legality of that verdict upon which you are called to act. Should this be the case, then, indeed, might we legitimately appeal to your affections, and ask that the quality of mercy should enter the scale and turn the balance. Should this be the case, we do most fervently appeal to you, so to exercise your high power as that it shall be in the similitude of That Power which is above us all, whose "Mercy seasons Justice."

It is written, that "when the Almighty Parent of the universe had finished the work of his material world, he considered of the creation of Man, and called to his counsel in this question his holy attributes of Justice, Mercy, and Truth. Truth first addressed the Heavenly Throne, and said 'Father, create him not, for he will defile the work of thy hands.' Justice in her turn next spoke, and said, 'Father create him not, for he will despise thy laws.' Mercy then came forward, and kneeling at the footstool of the Heavenly Parent, in accents mild, and with the tone of supplication, said 'Father, create him, for I will watch over his footsteps, and in the greatness of his transgressions, I will teach him amendment.'"

Remember, then, O Man! that thou art the child of Mercy, and mercifully deal with thy brother.

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